Supreme Court of the United States

October Term, 1967
No. 1162

THE TIMES MIRROR COMPANY,

Appellant.

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal From the United States District Court for the Central District of California.

PETITION FOR REHEARING.

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To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Appellant respectfully petitions for a rehearing of this Court's order affirming the decision of the United States District Court for the Central District of California.

1. This Court Should Grant Full Review in This Case Because of Its Importance to the Future Operation of the Newspaper Industry.

Both this case and the *United States v. Citizen Publishing Co.* case, which this Court will probably be asked to decide,[1] are landmark decisions which could have immense implications for the future shape of com-

[1]Appellant has been advised that the defendants in *Citizen Publishing* have filed a notice of appeal and do plan to file a Jurisdictional Statement.

petition in the newspaper industry. In view of the important role which newspapers play in a democratic society, the shape of competition in the newspaper business is a matter of paramount national concern. In his recent testimony before the Senate Judiciary Committee Subcommittee on Antitrust and Monopoly, the Assistant Attorney General for Antitrust observed that the newspaper industry is not only important because it "is larger than many if not most of the manufacturing industries in the nation's economy" and the "value of its production is greater than that of the drug industry or the meat products industry, and is roughly equivalent to that of the petroleum refining industry," but also because the newspaper business "is peculiarly touched by the public interest because it involves not only a commercial venture but also the dissemination and interchange of information and ideas."

The Assistant Attorney-General acknowledged in his testimony that the Justice Department would regard a Supreme Court decision affirming this case as a "valuable precedent" in cases involving metropolitan and suburban newspapers. Although Mr. Turner's description of the case reflects some misconceptions concerning the facts of the case and the content of the District Court opinion, his admission that this is a very important case ought to be sufficient reason for concluding that full review is warranted.

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[2]San Bernardino is *not* a suburb of Los Angeles, the Sun is not a suburban paper, and the District Court did not suggest that this merger falls within the metropolitan-suburban category. However, a proper analysis of the role of metropolitan and community newspapers could have provided some insights into the actual roles of metropolitan and suburban newspapers. Therefore, Mr. Turner's conclusion that this case could be a significant precedent is correct in spite of these misconceptions.

2. Full Review Is Required Because the Government and the District Courts Have Failed to Develop a Coherent and Consistent Concept of Newspaper Markets.

This case and the *Citizen Publishing* case could serve as effective vehicles for an examination of the economics of the industry and the development of guidelines for the application of antitrust policy to the newspaper business. These cases have thus far failed to serve that purpose because the Government and the District Courts were unable to develop a coherent and consistent concept of newspaper markets which could serve as a basis for such an examination and the development of such guidelines. They have already produced a total of four different answers to the same market question.

The Government contended at the trial in this case that all newspapers which are *sold in the same area* compete with each other (Post Trial Fact Brief for the United States, p. 20) and should, accordingly, be included in the same product market. Meanwhile, the Government contended in *Citizen Publishing* that "daily newspapers *published in Tucson* are a separate line of commerce" (Trial Brief for the United States, p. 5, emphasis added). In other words, the Government contended in *Citizen Publishing* that local newspapers are in a distinct product market while it contended in this case that local and out-of-town newspapers are part of the same product market.

The District Court in *Citizen Publishing* accepted the Government's contention in that case. It found that out-of-town newspapers do not compete with local newspapers because buyers do not regard them as substitutes. The District Court in this case concluded that

it did not have to decide whether local and out-of-town newspapers compete or not. It adopted a third theory for determining newspaper market boundaries and held that *all* daily newspapers should be included in the same product market because they are products of the same industry.

The Solicitor-General rejected all three theories in the Government's Motion to Affirm. He undoubtedly recognized that markets cannot be defined to include noncompeting products and that the District Court's reasoning is indefensible.[3] He also refrained from adopting either of the Government's trial contentions. Although the Solicitor-General expressed approval of the exclusion of the *Los Angeles Times* and the Phoenix newspapers from the Tucson market (MA p. 14) and admitted that the Government and the District Court erred in including the *New York Times* and the *Washington Post* in the San Bernardino market (MA pp. 14-15, n. 5), he nonetheless insisted that some out-of-town newspapers are substitutes for local newspapers and should be included in the local newspapers market. He suggested that some local and out-of-town newspapers possess some common quality which makes them competing products while other local and out-of-town newspapers are not competing products.[4]

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[3]Instead of defending the District Court's approach to market definition, the Government has attempted to create the impression that the District Court did not mean what it said by suggesting that the District Court really did conclude that the Times and the Sun compete for circulation and merely failed to incorporate such a finding in its lengthy opinion through oversight. An examination of the District Court's product market discussion (JS App. A 15-23) will demonstrate that the District Court's failure to decide whether the Times and the Sun compete was deliberate.

[4]Appellant did not receive the Motion to Affirm until April 15 and was, therefore, unable to file a reply brief before the

This Court's action in affirming the decision below without argument or opinion has compounded the confusion. It will be impossible for courts, lawyers, the Government or newspapers to determine which of these four inconsistent market theories the Court intended to approve. We submit that full review in both cases is required to eliminate this confusion and to develop some guidelines for the application of antitrust policy to the newspaper business.

3. The Government's Latest Theory of Newspaper Markets Is Not Meritorious.

Appellant submits that the Court should also reconsider its decision because the Government's latest theory for determining newspaper markets is not meritorious. The Solicitor-General did not attempt to identify the mysterious quality which supposedly makes the *Los Angeles Times* a substitute for the *San Bernardino Sun* even though the *Phoenix Gazette* is not a substitute for the *Tucson Daily Citizen*.

The Solicitor-General strongly suggested that relative circulation in the local area provides the clue to the presence or absence of this quality. He noted that the Tucson newspapers have a combined circulation of 73,799 in the Tucson area while the out-of-town papers have a circulation of 3,379, or 4.4% of the total, and concluded that these figures demonstrate a lack of effective competition. The *San Bernardino Sun* and *San Bernardino Telegram* have a combined circulation of 48,154 in the San Bernardino City Zone [Ex. 899] while the Times has a circulation of 3,377 in that area

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April 19 conference which would demonstrate the significance of the conflicts among the Justice Department's positions.

[Ex. 898]. Thus, the Times circulation is 6.6% of the combined circulation of these three papers and an even smaller percentage of the combined circulation of all daily newspapers sold in the area. Therefore, the number which, according to the Solicitor-General's theory, reveals that an out-of-town newspaper possesses the mysterious quality which makes it a substitute for a local newspaper must be somewhere between 4.4% and 6.6%.

The record in this case certainly does not support the Government's latest theory. The statements of a few witnesses to the effect that they believed that all newspapers which circulate in the same area compete with each other (MA p. 13) are inconsistent with the Government's latest theory.

Even though the Government had the burden of proof at trial, it failed to present any competent evidence, by cross-elasticity studies or any other means, that buyers do regard the Times and Sun as substitutes. Several San Bernardino residents testified that they did not regard the papers as substitutes [Tr. 2724, 2753, 3008] while the Government was unable to produce a single San Bernardino resident who would testify that he did regard the papers as substitutes. The Solicitor-General attempted to disguise the Government's failure to present affirmative evidence by implying that Appellant relied exclusively upon Dr. Phillips' cross-elasticity study. Dr. Phillips' studies merely confirmed the observations of expert and other witnesses.[5]

[5]The Government's suggestion that the absence of cross-elasticity may be attributable to errors in Dr. Phillips' methods is fanciful. The errors discovered in the Exhibit 808 circulation data were small [Tr. 1740-41]. The entire computer program was nonetheless rerun with the corrected data of Exhibit 808A. The tests again failed to reveal any relationships between relative

The Solicitor-General has attempted to minimize the significance of the absence of cross-elasticity by implying that this Court may have erred when it adopted cross-elasticity as the test of substitutability in *Brown Shoe*. He contended that there may be buyers who are totally insensitive to price changes, but nonetheless shift from one product to the other in response to changes in the product (MA p. 12). This is certainly an interesting theory, but there is no evidence whatsoever

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price and relative circulation changes in the two papers [Tr. 1741-42]. While some unavoidable discrepancies between the geographic area used to compute the Times' circulation data and the geographic area used to compute the Sun circulation data were admitted to remain in Exhbit 808A [Tr. 1737-38], it was Dr. Phillips' expert opinion that these discrepancies were too small to have any effect upon his conclusions [Tr. 1742]. The admission by the witness that errors in Exhibit 808 *could* (not would) result in erroneous conclusions [Tr. 1580] is an obvious fact, but one of no relevance to the ultimate conclusions drawn by the witness. The evidence in the record clearly demonstrates that there is no cross-elasticity of demand between the Times and the Sun and the opinion below indicates that the trier of fact recognized that this is the case.

Some other statements in the Motion to Affirm which convey an erroneous impression of the trial record also require comment. The quotation from Dr. Wilcox to the effect that San Bernardino residents would regard the Sun as a complete newspaper does not support the Government's contention that they would regard the Times as a substitute. The whole thrust of his testimony was that San Bernardino residents would not regard the Times as a complete newspaper for their purposes because it did not provide local news.

The reference to Otis Chandler's testimony that there is competition between the Times and the Sun is even more misleading. He only testified that there was competition in the limited sense defined by Government counsel. And, Government counsel defined competition as being simply that the two newspapers had circulation in the same area [Tr. 561].

Finally, the Government's reliance upon Mr. Pinkley's testimony is misplaced. His objectivity is open to question because of his display of unusual rancor against Appellant's management undoubtedly resulting from his discharge as publisher of the *Los Angeles Mirror* [see Tr. 1053]. His identification as a former Sun employee is misleading since he had not worked for the Sun for over forty years [Tr. 960-961].

that buyers shift from the Times to the Sun in response to changes in the contents of the papers. On the contrary, the evidence demonstrated that neither paper could change its contents to meet the needs of the other paper's readers without destroying its existing market. The record shows that every paper is, as the District Court found, a "captive of its community."

The District Court recognized that the Government failed to prove that the Times and the Sun compete for circulation. Neither the District Court's novel market theory nor the Government's newest newspaper market theory can fill that gap.[6]

It appears that the Government's Motion to Affirm must have misled the Court as to the nature of this case and the nature of the decision below. The Court should, therefore, vacate its order affirming the decision below and grant the Appellant a hearing.

Respectfully submitted,

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[6]The Solicitor-General also suggested that even if the Times and the Sun do not compete there may have been potential competition between the Times and the Sun. The Government spent a great deal of time at trial trying to develop some evidence of potential competition. The District Court's failure to discuss the question in its lengthy opinion shows that the District Court recognized that the Government had failed to prove either actual or potential competition.

The Government has also attempted to reinforce the District Court's unsubstantiated entry barrier conclusions by asserting that the conversion of the Rialto paper from an evening daily to a weekly is evidence of enhanced entry barriers while asserting that the conversion of the Victorville paper from a weekly to an evening daily is irrelevant because the District Court was only concerned with entry barriers in the morning submarket (MA p. 20). Such inconsistencies within the same paragraph provide further evidence that the Justice Department needs guidance from this Court in order to develop any coherent concept of relevant newspaper markets.

Certificate of Counsel.

I, Julian O. von Kalinowski, counsel for the above named appellant, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

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Counsel for Appellant.